IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-108

* * *

MILA K. CAMERON,

*Petitioner,*

V.

HONORABLE JOE R. GREENHILL, ET AL.,

*Respondents.*

* * *

**On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Texas**

* * *

# RESPONDENTS' BRIEF IN OPPOSITION

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## INDEX OF AUTHORITIES

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Attorney General of Texas, on behalf of the Honorable Joe R. Greenhill, Chief Justice of the Supreme Court of Texas, and Zollie Steakley, Jack Pope, James Denton, Sears McGee, Sam Johnson, Charles Barrow, Robert Campbell and Franklin Spears, all Associate Justices of the Supreme Court of Texas, respectfully requests that the Court deny the petition for writ of certiorari.

## OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals is

*Cameron v. Greenhill*, 577 S.W.2d 389 (Tex.Civ.App. - Austin 1979), reproduced as Appendix O to the petition for writ of certiorari. The *per curiam* opinion of the Supreme Court of Texas is *Cameron v. Greenhill*, 22 Tex.Sup.Ct.J. 385 (June 2, 1979), reproduced as Appendix P to the petition for writ of certiorari.

## JURISDICTION

The Court has no jurisdiction under 28 U.S.C. §1257 for the reasons stated *infra*.

## STATUTE INVOLVED

The only statute involved in this case is Article 6252-13a §3(1), Texas Revised Civil Statutes, commonly known as the Administrative Procedure and Texas Register Act. The pertinent portion of the statute reads as follows:

> 'Agency' means any state board, commission, department, or officer having statewide jurisdiction, other than an agency wholly financed by federal funds, the legislature, the courts, the Industrial Accident Board, and institutions of higher education, that makes rules or determines contested cases.

TEX.REV.CIV.STAT.ANN. art. 6252-13a, §3(1) (Supp. 1978) [hereinafter the Texas APA].

## QUESTIONS PRESENTED

1. Respondents believe the basic issue presented in this action to be solely a question of state statutory construction which can be stated as follows:

Whether the Texas APA is applicable to decisions and rule making of the Texas state courts.

2. Whether the Texas Supreme Court's refusal to disqualify itself from considering the merits of the first question deprived Petitioner of due process.



## STATEMENT OF THE CASE

Petitioner, an attorney licensed in Texas, brought this suit against Respondents, nine justices of the Supreme Court of Texas, complaining of an order of that court setting a special fee assessment against members of the State Bar of Texas. She brought this action in a Texas district court as an administrative "appeal" and alleged jurisdiction to exist solely under the provisions of the Texas APA. The Texas district court dismissed the case for lack of subject matter jurisdiction relying upon §3(1) of the Texas APA which is *unqualified* in its exclusion of "the courts" from the definition of an "agency" covered by the Texas APA.

On appeal, the Austin Court of Civil Appeals affirmed the narrow jurisdictional ruling of the district court in a one page opinion which held that the Texas courts are entirely exempt from the Texas APA. See, Appendix O, Petitioner's Brief. In a *per curiam* opinion, a unanimous Texas Supreme Court held that under both Texas law and the United States Constitution it was not disqualified from considering Petitioner's application for writ of error. On the merits, the Court then refused Petitioner's application thereby affirming the district court's dismissal for lack of jurisdiction. See, Appendix P, Petitioner's Brief.

## REASONS WHY THE WRIT SHOULD BE DENIED

### 1. THE PRIMARY ISSUE IS SOLELY A QUESTION OF STATE LAW.

The state court decision focused solely on an issue of purely state concern, *viz.*, the construction of the meaning of the "courts" exception to the §3(1) definition of an "agency" covered by the Texas APA. The Texas courts did not construe the "Texas Legislative Scheme for the control of the Statewide Profession of the Practice of Law" (Petitioner's Brief, p. 3). Rather, they construed §3(1) of the Texas APA. Therefore, the Texas

court's decision can be sustained on an independent ground of state law. Since the "courts" exception is unqualified, it cannot be construed to allow justices of courts to be sued under the Texas APA depending upon the capacity in which they act. See, e.g., *Wilson v. State*, 582 S.W.2d 484 (Tex.Civ.App. -Beaumont 1979, no writ) [the Texas APA completely exempts the functions of local grievance committees of the State Bar Association.

2. PETITIONER HAS FAILED TO PROPERLY PRESENT HER CLAIMS IN STATE COURT; THEREFORE, HER CASE IS NOT RIPE FOR REVIEW BY THIS COURT.

The Texas courts cannot decide the merits of a federal question without first having subject matter jurisdiction. The only grounds for jurisdiction urged by Petitioner in the Texas courts was under the provisions of the Texas APA. There is clearly no jurisdiction under the Texas APA for Texas courts to hear Petitioner's claim. The only way the Texas court could have reached the merits of any federal question under the Texas APA, therefore, was through a constitutional challenge to the scope of the "courts" exception contained in the state statute. But the Petitioner never raised such a constitutional challenge to the Texas APA. In failing to do so, she precluded the Texas courts from addressing any federal issue. For Petitioner to prevail now, this Court would have to rule that §3(1) of the Texas APA violates Petitioner's procedural due process rights; that is an issue which the Texas courts were not given the opportunity to address. Therefore, the exercise of certiorari is not proper in this case.

3. THE DECISION BELOW PRESENTS NO CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY CIRCUIT COURT OF APPEALS.

The Texas Supreme Court held that under this



Court's summary affirmance of the three-judge district court decision in *Buschbacher v. Supreme Court of Ohio*, No. C-2-72-743, 75-751, 76-309 (S.D. Ohio 1976), *aff'd sub. nom., Cuyahoga County Bar Association v. Supreme Court of Ohio*, 430 U.S. 901 (1977), and *Withrow v. Larkin*, 421 U.S. 35 (1975), it is not a due process violation for the justices of the Texas Supreme Court, who ordered the submission of a referendum for the fee assessment of Texas attorneys at the request of the State Bar directors, to determine the legality of such fee assessment. See, Appendix P, Petitioner's Brief. The court in *Buschbacher* further held that the United States Constitution does not require a hearing *prior to* a state supreme court's promulgation or enforcement of a rule requiring attorneys to pay a fee assessment even if the rule does not specifically state that failure to pay the fee will automatically result in an attorney's suspension.[1] In summarily affirming the decision of the three-judge court, this Court has directly rejected all of Petitioner's contentions.

Petitioner alleges no conflict with any Circuit Court of Appeals decision. The only Circuit Court decision is in complete accord with the decision of the Texas court below. *Ables v. Fones*, 587 F.2d 850 (6th Cir. 1978).

While failing to discuss or even mention the controlling precedents in her petition, Petitioner offers

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[1]The *Buschbacher* decision follows this Court's consistent line of cases which approve the broad power and traditional role of state supreme courts to regulate their state's legal profession. *Goldfarb v. Virginia State Bar Association*, 421 U.S. 773, 789, n. 18 (1975); *Lathrop v. Donohue*, 367 U.S. 820 (1961). The Texas Supreme Court has the inherent power and ultimate control over the regulation of the practice of law in Texas, including the power to require the periodic payment by Texas attorneys of reasonable and necessary expenses such as those being contested herein. See, *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398-399, n. 1 (Tex. 1979), and cases cited therein.

no new reason or authority which would imply that these decisions are ripe for reconsideration and possible overruling or change. Certainly there is no better disposition of *In re Murchison*, 349 U.S. 133 (1955), upon which Petitioner relies, than that given by Mr. Justice White for the unanimous court in *Withrow v. Larkin*, *supra*:

> Plainly enough, *Murchison* has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications. The court did not purport to question the *Cement Institute* case, *supra*, or the Administrative Procedure Act and did not lay down any general principle that a judge before whom an alleged contempt is committed may not bring and preside over the ensuing contempt proceedings. The accepted rule is to the contrary . . .

421 U.S. at 53. See also, *Hortonville Joint School District v. Hortonville Education Association*, 426 U.S. 482 (1976). This Court said in *Withrow* that state administrators are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. The same must be equally true of justices of a state's highest judicial tribunal.

The decision below, therefore, is in complete accord with the policy and precedent of this Court.

## CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondents respectfully request that the petition for writ of certiorari be denied.



Respectfully submitted,

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